90

Supreme Court, U.S.
FILED
071305 APR 14 2008
OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

CITY AND COUNTY OF HONOLULU,
a municipal corporation of the State of Hawaii,
Petitioner,

v.

SALLY A. MATSUDA, Trustee of the Sally A. Matsuda Self-Trusted Trust dated October 15, 1993, *et al.*
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

CARRIE K.S. OKINAGA, 5958
Corporation Counsel
(808) 768-5100
DONNA M. WOO
(*Counsel of Record*)
First Deputy Corporation Counsel
(808) 768-5102
DON S. KITAOKA
Deputy Corporation Counsel
(808) 768-5248
City and County of Honolulu
530 S. King Street, Room 110
Honolulu, Hawaii 96813
Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Several lessees of a residential condominium apartment complex ("Lessees") filed a lawsuit against the City and County of Honolulu (the "City") challenging Ordinance 05-001 (2005). Ordinance 05-001 repealed the City's leasehold conversion ordinance, Chapter 38, Revised Ordinances of Honolulu ("ROH"), the statutory process by which leasehold condominium owners, including Lessees, could purchase the leased fee title to their units, through the use of the City's power of eminent domain. Pursuant to Chapter 38, the Lessees executed contracts with the City for the acquisition of the leased fee interests in their condominium units. However, Lessees never received City Council approval prior to the repeal of Chapter 38, and therefore they were unable under Ordinance 05-001 to complete their leasehold conversion.

The Ninth Circuit Court of Appeals departed from the longstanding policy of judicial deference to local legislative determinations of public use in the exercise of the power of eminent domain and held that the City's repeal of Chapter 38 may violate the Contracts Clause and/or the Due Process Clause of the Constitution of the United States.

Therefore, the question presented in this petition is as follows:

Whether the Ninth Circuit erred in concluding that the Honolulu City Council's repeal of the leasehold conversion ordinance may violate the Contracts Clause and/or the Due Process Clause, and whether after the repeal, the City can still be contractually bound to

exercise its power of eminent domain to acquire property for leasehold conversion?

PARTIES TO THE PROCEEDINGS

The Petitioner is the City and County of Honolulu ("Petitioner").

The Respondents are Sally A. Matsuda, Trustee of the Sally A. Matsuda Self-Trusteed Trust dated October 15, 1993; Ralph James Mitchell; Lucy Mitchell; Noosha Fesharaki; Earl Kidder; Jeenie Marie Kidder; James Rapisarda; Jonathan Von Brana; Thomas Preston; Loren Hohman; Herbert Caplan; Elena Pecile, Co-Trustee of the Herbert Caplan and Elena V. Pecile Trust dated March 27, 2003; Wilma Parker, Trustee of the Wilma I. Parker Trust dated March 16, 1989 as amended; Troy Williams; Larry Weisner; Delores Weisner; Marianne Marion Jaeger; Richard Johnson; William Garrett Fuson; Kang Yuk Lee; Suk Ja Lee; Claude Rothe, Trustee of the Claude R. Rothe Living Trust dated March 26, 1998; Alvin Olson, Trustee under Alvin R. Olson Revocable Trust Agreement dated July 20, 1998; Natalia Indrasari; Warren Sweet, Trustee of the Sweet John Revocable Trust dated June 21, 1991; Rheba Alice Sweet; Robert Mehring; Ayumi Watanabe Mehring; Arnold Flemmings; Mariana Flemmings, Co-Trustee of the Arnold Theodore Flemmings and Mariana Flemmings Revocable Living Trust dated December 6, 1999; Melvin Takeo Matsuoka; Delwin Schneider; Katherine Schneider, Trustee under the Delwin Byron Schneider and Katherine Louise Schneider Family Trust dated October 14, 1996; Ronald Silverman; Farhad Simyar; and Frank Winston Kern ("Respondents").

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED . 1

STATUTES, ORDINANCES AND CHARTER PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 6

A. CHAPTER 38, REVISED ORDINANCES OF HONOLULU ("ROH") 6

B. ORDINANCE 05-001 REPEALS ROH CHAPTER 38 7

C. DISCOVERY BAY CONDOMINIUM PROJECT 12

D. LESSEES' LAWSUIT. 13

1. Claims Asserted. 13

2. Lessees' Attempt To Enjoin And Restrain The City. 14

3. Lessees' Motion For Summary Judgment. 15

4. City's Motion For Summary Judgment 17

5. Appeal to the Ninth Circuit. 18

REASONS FOR GRANTING THE PETITION . . 19

A. ORDINANCE 05-001 DOES NOT VIOLATE THE CONTRACT CLAUSE (ART. I, § 10) OF THE UNITED STATES CONSTITUTION. 19

B. THE CITY COUNCIL'S RIGHT TO EXERCISE ITS POWER OF EMINENT DOMAIN AS IT SEES FIT CANNOT BE ABRIDGED BY CONTRACT. 21

C. THE NINTH CIRCUIT'S DISTINCTION BETWEEN CONTRACTS RESTRAINING THE EXERCISE OF THE POWER OF EMINENT DOMAIN, AND CONTRACTS AFFIRMATIVELY REQUIRING THE EXERCISE OF THE POWER OF EMINENT DOMAIN IS ILLUSORY. 25

D. COURTS MUST DEFER TO THE LEGISLATIVE BRANCH'S DETERMINATION OF PUBLIC USE . . . 28

E. THE CITY'S EMINENT DOMAIN POWER IS NOT BOUND BY THE PROHIBITION IN THE CONTRACT CLAUSE. 30

F. LESSEES' SUBSTANTIVE DUE PROCESS CLAIM FAILS BECAUSE IT IS PREEMPTED BY OTHER CONSTITUTIONAL CLAIMS. 33

G. LESSEES ARE NOT ENTITLED TO RELIEF UNDER 42 U.S.C. § 1983 35

CONCLUSION 35

APPENDIX

Appendix A - Jan. 14, 2008, Ninth Circuit Opinion and Judgment 1a

Appendix B - Jan. 30, 2006 District Court Judgment in a Civil Case 22a

Appendix C - Oct. 27, 2005, Order Granting Defendants Motion for Summary Judgment 24a

Appendix D - July 19, 2005, Order Denying Plaintiffs Motion for Summary Judgment . . 35a

Appendix E - Ordinance 91-95 . . . . . 53a

Appendix F - Chapter 38 (ROH) 94a

Appendix G - Ordinance 05-001 . . . . . 130a

Appendix H - Purchase Agreement 136a

TABLE OF AUTHORITIES

CASES

Armendariz v. Penman,
75 F.3d 1311 (9th Cir. 1996) 33

Berman v. Parker, 348 U.S. 26 (1954) 28

Board of the County Commissioners of Bryan County,
520 U.S. 378 (1989) 35

City of Corpus Christi v. Taylor,
126 S.W.3d 712 (2004) 23

City of Milwaukee v. Schomberg,
52 N.W.2d 151 (1952) 23

Contributors to Pennsylvania Hosp. v. City of Philadelphia,
245 U.S. 20 (1917) 31

Hawaii Housing Authority v. Midkiff,
467 U.S. 229 (1984) 28, 29

Home Building & Loan Ass'n v. Blaisdell,
290 U.S. 398 (1934) 22

Hsiung et al. v. City and County of Honolulu,
378 F. Supp. 2d 1258 (D. Hawaii 2005) 13

In re Application of Herrick,
93 Hawai'i 329 (1996) 10

Kelo v. City of New London,
125 S. Ct. 2655 (2005) 15, 16, 26

Kelo v. City of New London,
545 U.S. 469, 125 S. Ct. 2655 (2005) 29

Macri v. King County,
126 F.3d 1125 (9th Cir. 1997) 34

Matsuda et al. v. City and County of Honolulu,
378 F. Supp. 2d 1249
(D. Hawaii 2005) ..... *passim*

Matsuda v. City and County of Honolulu,
512 F.3d 1148
(9th Cir. Hawaii 2008) ..... *passim*

Richardson v. City and County of Honolulu,
124 F.3d 1150 (9th Cir. 1995) 29

Sears v. City of Akron,
246 U.S. 242 (1918) 28

State of Georgia v. City of Chattanooga,
264 U.S. 472 (1923) 22

U.S. Trust Co. of New York v. New Jersey,
431 U.S. 1 (1977) 18, 21, 32

United States v. Winstar Corp.,
518 U.S. 839 (1996) 17, 20

University of Hawaii Professional Assembly, et al. v. Cayetano, et al.,
183 F.3d 1096 (C.A. 9 (Hawaii) 1999) 20

West River Bridge Co. v. Dix,
6 How. 507, 12 L.Ed. 535 (1848) 18

West River Bridge v. Dix,
47 U.S. 507, 6 How. 507, 12 L. Ed. 535 (1848) . 22

Western Union Telegraph Co. v. Louisville & N.R. Co.,
258 U.S. 13 (1922) 24

CONSTITUTION

U.S. Const. art. 1 cl. 10 ..... 1, 3, 14, 19

U.S. Const. amend XIV § 1 ..... 1, 2

STATUTES AND ORDINANCES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 ..... 3, 35

Haw. Rev. Stat. § 46-1.5(6) 2, 7, 21

Ordinance 91-95 ..... *passim*

Ordinance 05-001 ..... *passim*

OTHER

Revised Charter of the City and County of Honolulu
1973 (2000 Edition) 2, 22

City and County of Honolulu Bill 53 (2004) 7, 8

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Ninth Circuit Court of Appeals' opinion is reported at 512 F.3d 1148, and is reprinted in the Appendix to the Petition ("App.") A. The United States District Court's (D. Hawaii) opinion is reported at 378 F. Supp. 2d 1249 and is reprinted at App. D.

JURISDICTION

The Ninth Circuit Court of Appeals issued its opinion on January 14, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Contracts Clause of the United States Constitution provides, "[n]o State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility." U.S. Const. art. I, cl. 10.

The Due Process Clause of the United States Constitution provides, "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATUTES, ORDINANCES AND CHARTER PROVISIONS INVOLVED

The ordinances at issue in this case are Ordinance 91-95, codified at Chapter 38, Revised Ordinances of Honolulu, which was repealed by Ordinance 05-001. The original version of Ordinance 91-95, the codified version (Chapter 38) and Ordinance 05-001 are set forth in full in the appendix, App. E, F and G.

Section 3-110 of the Revised Charter of the City and County of Honolulu 1973 (2000 Edition) ("RCH") states: "the council shall by resolution determine and declare the necessity of taking property for public purposes, describing the property and stating the uses to which it shall be devoted."

Hawaii Revised Statutes ("HRS") § 46-1.5(6) provides: "[e]ach county shall have the power to exercise the power of condemnation by eminent domain when it is in the public interest to do so."

STATEMENT OF THE CASE

On February 25, 2005, Lessees, owners of residential condominium apartments in the residential complex identified as "Discovery Bay," filed a lawsuit in the district court challenging Ordinance 05-001 (2005). Ordinance 05-001 repealed Chapter 38, Revised Ordinance of Honolulu (Ordinance 91-95), the

statutory process by which leasehold condominium owners, including Lessees, could purchase the leased fee title to their units, through the use of the City's power of eminent domain. Pursuant to Chapter 38, the Lessees executed agreements with the City that provided for the conveyance of leased fee interests in each Lessee's unit. However, these agreements were subject to the Honolulu City Council's approval by resolution, and Lessees never acquired City Council approval prior to the repeal of Chapter 38. Therefore, Lessees were unable under Ordinance 05-001 to complete their leasehold conversion.

In their lawsuit, Lessees asserted that the City's actions in repealing Chapter 38 by the enactment of Ordinance 05-001: (a) violated the Contract Clause of the U.S. Constitution, art. I, § 10, cl. 1, by acting to negate Lessees' contract for the sale and purchase of the leased fee title to their units through a condemnation proceeding pursuant to Chapter 38; (b) violated Lessees' right to substantive due process guaranteed by the Fourteenth Amendment to the U.S. Constitution, and (c) deprived Lessees of rights, privileges, and immunities guaranteed by the U.S. Constitution, subjecting the City to liability pursuant to 42 U.S.C. § 1983.[1] The lawsuit sought to declare Ordinance 05-001 as being void for alleged violations

---

[1] Plaintiffs also alleged a violation of the U.S. Constitution's prohibition against Bills of Attainder contained in art. I, § 10, cl. 1, because Ordinance 05-001 acted to single out Lessees. The district court's judgment in favor of the City on this claim was never appealed.

against the U.S. Constitution, and to enjoin its implementation.

By Order filed on July 19, 2005 (App. D), the district court ruled against Lessees in their motion for partial summary judgment, and determined, among other things, that, "the Contract Clause [of the U.S. Constitution] cannot be used under [the] circumstances [of these cases] to invalidate the repeal of Chapter 38 because the reserved powers doctrine reserves essential attributes of sovereignty such as the power of eminent domain to the discretion of the states." *Matsuda et al. v. City and County of Honolulu,* 378 F. Supp. 2d 1249, 1257 (D. Hawaii 2005). Based on these determinations, the district court held that, "[t]he City Council acted within its appropriate constitutional and legal limits in repealing Chapter 38." *Id.* at 1258. By Order dated October 27, 2005 (App. C), the district court reaffirmed its prior ruling by adopting the reasoning set forth in its July 19, 2005 Order, and granting the City's motion for summary judgment as to all counts asserted by Lessees in this lawsuit. Lessees appealed from those Orders.

On January 14, 2008, the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit") vacated the district court's grant of summary judgment in favor of the City, and remanded this action for further proceedings. App. A. *Matsuda v. City and County of Honolulu,* 512 F.3d 1148 (9th Cir. Hawaii 2008). The Ninth Circuit made an artificial distinction between contracts that require the City to refrain from the exercise of the power of eminent domain, and contracts that require the City to

affirmatively exercise its power of eminent domain. According to the Ninth Circuit, contracts that require the City to refrain from the exercise of the power of eminent domain are not enforceable under the reserved powers doctrine. However, the reserved powers doctrine does not apply to contracts that require the City to affirmatively exercise the power of eminent domain, and such contracts may be binding on the City.

The district court had found that this distinction was illusory. 378 F. Supp. 2d at 1257. The Ninth Circuit disagreed.

The Ninth Circuit's artificial distinction between contracts that require the City **not to** exercise its power of eminent domain, and contracts that require the City **to** exercise its power of eminent domain serves as the basis for this petition. The City asserts that any contractual constraint on the City Council's determination of public purpose in the exercise of its power of eminent domain cannot be binding on the City under the reserved powers doctrine. In the repeal of Chapter 38 by Ordinance 05-001, the City Council specifically determined that leasehold conversion was no longer supported by a valid public purpose. App. G at 131a-32a. The City Council chose to cease the use of its power of eminent domain for leasehold conversion. Therefore, under the reserved powers doctrine, the City Council cannot be constrained in this choice by a contract that binds the City to affirmatively exercise its power of eminent domain.

STATEMENT OF FACTS

A. CHAPTER 38, REVISED ORDINANCES OF HONOLULU ("ROH").

On December 16, 1991, Ordinance 91-95 was enacted, creating a new chapter in the Revised Ordinances of Honolulu ("ROH"), designated as Chapter 38, "Residential Condominium, Cooperative Housing and Residential Planned Development Leasehold Conversion." App. F. Chapter 38 set forth the authority, conditions, and process by which lessees under certain long-term leases of condominium units could purchase at a fair and reasonable price the leased fee interests to such condominium units.

The rights of such lessees to acquire the fee simple title to their respective condominium units depended upon the satisfaction of numerous requirements set forth in Chapter 38. Specifically, Chapter 38 required that a minimum of either 25 condominium owners within a condominium project or the owners of at least 50% of the condominium units within the project must apply for leasehold conversion in order to trigger the condemnation mechanism set forth in Chapter 38. ROH § 38-2.2, App. F at 105a. The applicants were also required to be owner-occupants of their units, i.e. the units must have served as their principal place of residence for a period of not less than one year immediately prior to application for conversion and during the period pending legal proceedings to acquire the fee, and the applicants were required to have complete possessory control of the premises during those periods. Applicants were also subject to age and residency requirements, and could not own fee simple

residential lands in the City. ROH § 38-2.4, App. F at 107a. Finally, before condemnation could begin, the City Council was required to adopt a resolution approving the exercise of eminent domain.

Under Hawaii law, the City Council has the ultimate power to condemn and has the discretion whether or not to exercise the power of eminent domain. The City's power of eminent domain flows from HRS § 46-1.5(6). This provision states, "Each county shall have the power to exercise the power of condemnation by eminent domain when it is in the public interest to do so." This power of eminent domain is wielded exclusively by the City Council. RCH Section 3-110 states, "the council shall by resolution determine and declare the necessity of taking property for public purposes, describing the property and stating the uses to which it shall be devoted."

The adoption of a condemnation resolution for leasehold conversion by the City Council would establish that the condemnation of the leased fee interest of the subject property by the City's exercise of its power of eminent domain was necessary for the public purpose and use as declared in Ordinance 91-95 and the purpose stated in Chapter 38. Without an adopted resolution, the City could not initiate a condemnation lawsuit.

B. ORDINANCE 05-001 REPEALS ROH CHAPTER 38.

On January 26, 2005, the City Council of the City and County of Honolulu approved Bill 53 (2004), CD1,

FD1 ("Bill 53") on third reading. On February 9, 2005, Mayor Mufi Hannemann signed Bill 53 into law as Ordinance 05-001, (App. G), which repealed ROH Chapter 38.

In Ordinance 05-001, the City Council issued the following findings:

> The council understands that the use of eminent domain should not be taken lightly and must be justified by a valid public purpose. Section 3-110 of the Revised Charter of the City and County of Honolulu ('Charter') states: 'The council shall by resolution determine and declare the necessity of taking property for public purposes, describing the property and stating the uses to which it shall be devoted.' Article I, Section 20 of the Hawaii Constitution also states that private property shall not be taken for public use without just compensation. Thus, the exercise of eminent domain must be supported by (1) a valid public purpose and (2) just compensation. Under Hawaii law, the council has the discretion whether or not to exercise the power of eminent domain. The city has always taken the position that the council has the ultimate power to condemn.
>
> The public purposes of Chapter 38 were set forth in detail in Ordinance 91-95. According to Ordinance 91-95, the purpose of Chapter 38 was to provide affordable housing and to strengthen the economy through fee ownership. Ordinance 91-95 lists 'runaway land prices,' 'shortage of fee simple residential condominiums,' 'artificial

inflation of land values,' 'lessees forced to accept long-term leases . . . which contain terms and conditions which are financially disadvantageous to them,' 'land values, artificially inflated by concentrated or single ownership,' and 'potential for economic instability and disruption on Oahu' as public purposes furthered by Chapter 38.

The council finds that mandatory conversion of multi-family residential leaseholds under Chapter 38 is no longer needed to assuage the social and economic problems mentioned in Ordinance 91-95 and, therefore, no longer advances a public purpose for which the city should exercise its extraordinary powers of condemnation. The social and economic problems listed as the public purposes furthered by Chapter 38 do not exist today to the same extent as they may have existed in 1991.

The council further finds that a lessee purchasing a residential leasehold unit knew or should have known about the negative aspects of the lease prior to the purchase. Since 1990, such a lessee should have received a copy of the underlying lease. Since 1991, the lessee should have received a simplified disclosure of the salient terms of the lease agreement, including but not limited to, the remaining term of the lease, the rent renegotiation dates, the potential for significant increases in renegotiated rents, and the surrender clause.

> In addition, it is a fundamental principle that the power to enact necessarily implies the power to repeal and one legislature cannot be limited or bound by the actions of a previous one. Thus, the council has the right to make an independent decision whether to repeal the law entirely.
>
> Finally, 'there is no vested right in a public law which is not in the nature of a private grant, and however beneficial a statute may be to a particular person or however injuriously the repeal may affect him, the legislature has the right to abrogate it. . . . No person has a vested interest in any law or legislative policy which entitles him to have it remain unaltered for his benefit.' *In re Application of Herrick*, 93 Hawai'i 329, 338 (1996).
>
> Based on the foregoing findings, the council believes and concludes that Chapter 38 no longer serves a public purpose and should be repealed.

App. G at 130a-32a.

These lengthy findings evidence that the City Council appreciated the gravity of the issue, and that Bill 53 was passed as a result of Council's insightful and thoughtful analysis. These findings are of utmost importance in the matter at bar and serve as a complete legal justification for the repeal of Chapter 38. Bill 53 also provided a "savings" clause for those condominium units that were already in the process of

leasehold conversion under Chapter 38 when Ordinance 05-001 became law. The clause provides:

> SECTION 3. (a) This ordinance shall not affect any eminent domain proceeding for the acquisition of units validly designated in projects, the condemnation of which units was approved by the council by resolution before the effective date of this ordinance. Such an eminent domain proceeding may be instituted or, if already instituted, continued after the effective date of this ordinance in accordance with Chapter 38, ROH, as existing on the day before the effective date of this ordinance. . . .

App. G at 133a.

The approval of the City Council is the determinative event for the continuation of the leasehold condominium conversion process under ROH Chapter 38 for condominium units that were already in the conversion process when Chapter 38 was repealed. If a condemnation resolution had already been issued for condominium units in the process of condominium conversion, Ordinance 05-001 recognized that those condominium units would be "grandfathered in" and the process of condemnation could continue. The issuance of a condemnation resolution by the City Council was by necessity the determinative factor in the savings clause because the City Council specifically found in Ordinance 05-001 that there no longer was a public purpose in leasehold conversion. Therefore, after the enactment of Ordinance 05-001, the City Council could not issue a new condemnation resolution because such a

resolution could not be supported by a valid public purpose. Only those condominium units covered by a previously issued condemnation resolution could be grandfathered in.

Ordinance 05-001 became law, and Chapter 38 was repealed, effective February 9, 2005. App. G at 135a. Only those lessee applicants who received City Council approval before February 9, 2005 were allowed to complete the process of leasehold condominium conversion under the provisions of Chapter 38.

C. DISCOVERY BAY CONDOMINIUM PROJECT.

The Discovery Bay Condominium project (the "Discovery Bay") consists of several leasehold condominium units located at 1778 Ala Moana Boulevard, Honolulu, Hawaii. The Lessees hold leasehold interests in certain units at Discovery Bay.

Lessees began the processing of their applications for leasehold conversion, wherein they signed agreements with the City to purchase the fee simple interests underlying their leasehold Discovery Bay units. Lessee applicants at Discovery Bay did not receive City Council approval prior to February 9, 2005, and therefore under the "savings clause" of Bill 53, they were unable to complete their leasehold conversion.

D. LESSEES' LAWSUIT.

1. Claims Asserted.

On February 25, 2005, Lessees filed their lawsuit against the City.[2] Lessees claim that their constitutional rights have been violated because Bill 53 does not allow them to complete their leasehold conversions. Specifically, Lessees asserted the following claims against the City:

(1) An alleged violation of the Contract Clause of the U.S. Constitution, art. I, § 10, cl. 1, because Bill 53 acted to negate contracts entered into pursuant to Chapter 38 (the "Contract Clause Claim");

---

[2] On February 16, 2005, plaintiffs-lessees in *Kathleen Hsiung, et al. v. City and County of Honolulu,* Civil No. CV05-00104 DAE/LEK (the "Kahala Beach Action") filed a lawsuit against the City asserting similar claims, *i.e.*, a Contract Clause Claim, a Bill of Attainder Claim, and a 1983 Claim, against the City, and sought to declare that Ordinance 05-001 was void for alleged violations against the U.S. Constitution, and to enjoin the implementation of said Ordinance. By Stipulation and Order dated June 17, 2005, the parties agreed and the district court ordered that the Kahala Beach Action and the Lessees' lawsuit against the City be consolidated for purposes of discovery and trial because: (a) "[b]oth civil proceedings involved common questions of law as required under Rule 42(a) of the Federal Rules of Civil Procedure, and (b) "[i]t [was] economically and judiciously feasible to consolidate [those] matters for discovery and trial." In *Hsiung et al. v. City and County of Honolulu,* 378 F. Supp. 2d 1258, 1269 (D. Hawaii 2005), the district court entered summary judgment against the plaintiff-lessees Kathleen Hsiung, et al., in favor of the City, as to all claims asserted in the Kahala Beach Action.

(2) An alleged violation of their right to substantive due process guaranteed by the Fourteenth Amendment to the U.S. Constitution (the "Due Process Claim"); and

(3) An alleged deprivation of rights, privileges, and immunities guaranteed by the U.S. Constitution, art. I, § 10, subjecting the City to liability pursuant to 42 U.S.C. § 1983 (the "§ 1983 Claim").

Lessees' lawsuit sought to declare Bill 53 as being void for alleged violations against the U.S. Constitution, and to enjoin the implementation of Ordinance 05-001.[3]

2. Lessees' Attempt To Enjoin And Restrain The City.

On March 11, 2005, Lessees filed a motion seeking the district court's issuance of a preliminary injunction enjoining and restraining the City from implementing Ordinance 05-001. The district court denied the motion on April 7, 2005, based on the lack of immediate and irreparable harm. Further, because the basic underlying facts are not in dispute and because strong interest exists on the part of the Lessees, the City, and the general public to warrant an

---

[3] Plaintiffs also alleged a violation of the U.S. Constitution's prohibition against Bills of Attainder contained in art. I, § 10, cl. 1, because Ordinance 05-001 acted to single out Lessees. The district court's judgment in favor of the City on this claim was never appealed.

expeditious adjudication of these lawsuits, the district court ordered that Lessees, as well as the plaintiffs in the Kahala Beach action, file motions for summary judgment.

3. Lessees' Motion For Summary Judgment.

Lessees filed their motion for summary judgment on April 25, 2005. The City filed its memorandum in opposition to said motion on May 9, 2005, and Lessees filed their reply memorandum on May 16, 2005. The district court held a hearing on the motions for summary judgment on June 22, 2005.

On July 19, 2005, the district court issued its Order denying Lessees' motion for summary judgment. App. D. In the Order, the district court rejected Lessees' arguments in support of their Contract Clause Claim, and recognized that under the "reserved powers" doctrine as articulated by the United States Supreme Court, the Contract Clause cannot be used to bind the City to a contract that purports to restrict its power of eminent domain. The district court stated in part:

> In recent years, the Supreme Court has taken no action that would undermine this longstanding authority. Rather, the Court's latest decisions regarding the power of eminent domain have only bolstered the 'longstanding policy of deference to legislative judgments in this field.' See, e.g., *Kelo v. City of New London*, 125 S. Ct. 2655, 2663 (2005). . . .
>
> . . . .

Plaintiffs simply have not brought forth any argument that would persuade the Court that this clear Supreme Court precedent is somehow inapplicable to the facts of this case. Plaintiffs assert that their contracts do not limit the right of eminent domain, but rather Chapter 38 does. Alternately, Plaintiffs argue that the aforementioned cases only stand for the proposition that a contract cannot prevent the exercise of eminent domain; contracts purporting to require the exercise of the eminent domain power are therefore acceptable under the reserved powers doctrine, Plaintiffs contend. These arguments are illusory. The sovereign right of eminent domain necessarily consists of the discretion to exercise that power in the manner the sovereign deems to be in the public's best interest. A contract requiring the sovereign to exercise the power is just as limiting as a contract prohibiting it from doing so. Although factually distinguishable, the Supreme Court's recent decision in *Kelo* may be construed as support for the proposition that a legislature's power of eminent domain necessarily encompasses the ability to both exercise the right and to limit the right. *Kelo, 125 S.Ct. at 2668.* ('In affirming the City's authority to take petitioners' properties, ... [w]e emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.'). Thus, the Court finds that the Contract Clause cannot be used under these circumstances to invalidate the repeal of Chapter 38, because the reserved powers doctrine reserves essential attributes of

> sovereignty such as the power of eminent domain to the discretion of the states.

App. D at 48a-49a, 378 F. Supp. at 1257.

The Order directed the City to file a motion for summary judgment consistent with that decision.

4. City's Motion For Summary Judgment.

On August 31, 2005, the City filed its motion for summary judgment, seeking an order granting summary judgment in its favor on all claims asserted by Lessees in their Complaint filed on February 25, 2005. On October 7, 2005, Lessees filed their memorandum in opposition, and the City filed its reply memorandum on October 14, 2005.

On October 27, 2005, the district court issued its order granting the City's motion for summary judgment. App. C. In that Order, the district court affirmed and adopted its ruling as set forth in its prior July 19, 2005 Order denying Lessees' motion for summary judgment. The district court ruled, in part:

> In the July 19 order, the Court explained that Plaintiffs' Contracts Clause challenge must fail, because clear, binding precedent indicates that the reserved powers doctrine precludes contractual obligations from limiting a municipality's power of eminent domain. The reserved powers doctrine provides that 'a state government may not contract away "an essential attribute of its sovereignty."' *United States v. Winstar Corp.*, 518 U.S. 839, 888

> (1996). The Court explained to the parties that, under the reserved powers doctrine, 'the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty.' *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 23 (1977). Indeed, the United States Supreme Court has repeatedly held for more than a century that the Contracts Clause cannot be used to bind the state to a contract that purports to restrict its power of eminent domain. *See, e.g., West River Bridge Co. v. Dix*, 6 How. 507, 12 L.Ed. 535 (1848); U.S. Trust Co. of New York, 431 U.S. at 24, n. 21. The power of eminent domain, along with the police power, is often cited as the classic example of an 'essential attribute of sovereignty.' *U.S. Trust Co. of New York*, 431 U.S. at 23-24.

App. D at 33a. The district court noted that it did not misinterpret *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 23 (1977), as alleged by Lessees, and that it found, "[n]o other reason to reconsider its order of July 19." App. D at 34a. The City believes that the district court correctly interpreted the cases and applied the law upon which it based its Orders granting summary judgment in favor of the City and against Lessees.

5. Appeal to the Ninth Circuit.

On January 14, 2008, the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit") vacated the district court's grant of summary judgment in favor of the City, and remanded this

action for further proceedings. *Matsuda v. City and County of Honolulu*, 512 F.3d 1148 (9th Cir. Hawaii 2008). The Ninth Circuit held as follows:

> The contracts do not purport to require the City to refrain from the exercise of any sovereign power, including the power of eminent domain. Instead, the contracts reflect the City's decision to initiate proceedings to exercise its power of eminent domain over the property at Discovery Bay, and to convey the property to the Lessees if successful. This is not the type of agreement to which the reserved powers doctrine applies and, accordingly, we conclude that *U.S. Trust's* heightened scrutiny test provides the mandatory analysis.

App. A at 13a-14a, 512 F.3d at 1154-55. (Footnotes omitted).

The Ninth Circuit issued its Mandate on February 5, 2008, reinstating the district court's jurisdiction. App. A at 20a.

REASONS FOR GRANTING THE PETITION

A. ORDINANCE 05-001 DOES NOT VIOLATE THE CONTRACT CLAUSE (ART. I, § 10) OF THE UNITED STATES CONSTITUTION.

Lessees first claim was that the City violated the contract clause in art. I, §10 of the United States Constitution which states, "[n]o state shall . . . pass any . . . [l]aw impairing the Obligation of Contracts."

In *University of Hawaii Professional Assembly, et al. v. Cayetano, et al.*, 183 F.3d 1096 (C.A. 9 (Hawaii) 1999), the Ninth Circuit stated: "'[a] federal cause of action is stated under the contract clause when one alleges that he or she has a contract with the state, which the state, through its legislative authority, has attempted to impair.'" *Id.* at 1101. (Citations omitted). To determine whether a law operates as a "substantial impairment of a contractual relationship," the Ninth Circuit identified three components that must be analyzed: "'whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial.'" *Id.* at 1101-02. (Citation omitted).

Here, Lessees' claim that Ordinance 05-001 violates the Contract Clause has no merit. First and foremost, the City's power of eminent domain and its regulatory powers cannot be limited by a contract.

Historically, the Supreme Court of the United States has protected governments from contracting away their sovereign powers, including the power of eminent domain. The reserved powers doctrine shields successive legislatures from losing sovereign powers through contracts. *See United States v. Winstar Corporation*, 518 U.S. 839, 874 (1996). Cloaked in this protection, the City cannot be found to have violated the prohibition in the contract clause.

More importantly, the United States Supreme Court decided this matter long ago when it stated:

> As early as Fletcher v. Peck, the Court considered the argument that one legislature

> cannot abridge the powers of a succeeding legislature. It is often stated that the legislature cannot bargain away the police power of a State. . . *In short, the Contract Clause does not require a state to adhere to a contract that surrenders an essential attribute of its sovereignty. . . [T]he police power and the power of eminent domain were among those that could not be contracted away.*

United States Trust Company of New York v. New Jersey, 431 U.S. 1, 23 (1977); (Internal citations and quotations omitted) (Emphasis added).

These United States Supreme Court decisions create an impenetrable barrier to the relief the Lessees seek in this case.

B. THE CITY COUNCIL'S RIGHT TO EXERCISE ITS POWER OF EMINENT DOMAIN AS IT SEES FIT CANNOT BE ABRIDGED BY CONTRACT.

Ordinance 05-001 contained the following finding: "[u]nder Hawaii law, the council has the discretion whether or not to exercise the power of eminent domain. The city has always taken the position that the council has the ultimate power to condemn." App. G at 131a.

The City's power of eminent domain flows from HRS § 46-1.5(6). This provision states, "Each county shall have the power to exercise the power of condemnation by eminent domain when it is in the public interest to do so." As reiterated in the Council's

findings above, this power is wielded by the City Council[4] and it cannot be surrendered.

The United States Supreme Court has long held that power of eminent domain is preserved despite any contract provisions to the contrary. The Court stated:

> The power of eminent domain is an attribute of sovereignty, and inheres in every independent state. The taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed to be essential to the life of the state. It cannot be surrendered, and if attempted to be contracted away, it may be resumed at will.

State of Georgia v. City of Chattanooga, 264 U.S. 472, 480 (1923).

More succinctly stated, all contracts are subject to the right of eminent domain. *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 435 (1934) citing *West River Bridge v. Dix*, 47 U.S. 507, 6 How. 507, 12 L. Ed. 535 (1848).

State courts have followed in the footsteps of the high court. The Supreme Court of Wisconsin stated,

---

[4] Section 3-110 of the Revised Charter of the City and County of Honolulu states, "[t]he council shall by resolution determine and declare the necessity of taking property for public purposes, describing the property and stating the uses to which it shall be devoted."

"[t]he power of eminent domain is inalienable, and no Legislature can bind itself of its successors not to exercise this power when public necessity and convenience require it." *City of Milwaukee v. Schomberg*, 52 N.W.2d 151, 152 (1952).

Similarly, the Court of Appeals of Texas stated:

> A city may not enter into a contractual provision that limits its free exercise of governmental and police powers. The power of eminent domain or condemnation is a governmental function that cannot be delegated. A contract restricting a city's freedom to choose when to initiate condemnation proceedings is a contract in derogation of such power. Therefore, such a contractual restriction is contrary to public policy and, thus, illegal and void.

City of Corpus Christi v. Taylor, 126 S.W.3d 712, 719 (2004).

The above cases fortify the principle that a government cannot enter into an agreement to limit its eminent domain power. A government may elect to use its condemnation power if it so chooses. The reflection of this principle is equally clear. A legislative body cannot be bound by an agreement to affirmatively use its eminent domain power. A government may elect **not** to use its eminent domain power if it so chooses. The district court correctly echoed the City's position when it stated, "[a] contract requiring the sovereign to exercise the [eminent domain] power is just as limiting as a contract

prohibiting it from doing so." App. D at 49a, 378 F. Supp. at 1257.

This principle is evident in *Western Union Telegraph Co. v. Louisville & N.R. Co.*, 258 U.S. 13 (1922). There, the State of Kentucky enacted a statute whereby the telegraph company was authorized to condemn an easement for its use. Western Union initiated a condemnation proceeding against the railroad company pursuant to this statute. The condemnation proceeding traveled through the trial and appellate process and back to the trial court. However, the government then repealed the subject statute. The railroad company sought to dismiss the proceedings.

The United States Supreme Court held:

> Our conclusion, therefore, is that as the state could have withheld the power from telegraph companies to condemn the right of way of railroad companies, the state could withdraw the power before its exercise, and it could not be exercised before the conditions of condemnation were established and adjudicated, and this not preliminarily or dependently, but in final and unreviewable determination.

Id. at 22.

Accordingly, an agreement to exercise the power of eminent domain may be retracted if the government elects to do so. Therefore, even if contracts between the Lessees and the City are construed as requiring the City to affirmatively exercise its condemnation

powers in favor of the Lessees, the City is not restricted by such a provision. The City Council has the legislative authority to repeal Chapter 38 despite any contractual provision otherwise.

As recognized by the City Council, "it is a fundamental principle that the power to enact necessarily implies the power to repeal and one legislature cannot be limited or bound by the actions of a previous one. Thus, the council has the right to make an independent decision whether to repeal the law entirely." App. G at 132a.

C. THE NINTH CIRCUIT'S DISTINCTION BETWEEN CONTRACTS RESTRAINING THE EXERCISE OF THE POWER OF EMINENT DOMAIN, AND CONTRACTS AFFIRMATIVELY REQUIRING THE EXERCISE OF THE POWER OF EMINENT DOMAIN IS ILLUSORY.

The Ninth Circuit's opinion made an artificial distinction between contracts that require the City to refrain from the exercise of the power of eminent domain, and contracts that require the City to affirmatively exercise its power of eminent domain. According to the Ninth Circuit, contracts that require the City to refrain from the exercise of the power of eminent domain are not enforceable under the reserved powers doctrine. However, the reserved powers doctrine does not apply to contracts that require the City to affirmatively exercise the power of eminent domain, and such contracts may be binding on the City.

The district court had found that this distinction was illusory. The district court stated:

> Plaintiffs assert that their contracts do not limit the right of eminent domain, but rather Chapter 38 does. Alternatively, Plaintiffs argue that the aforementioned cases only stand for the proposition that a contract cannot prevent the exercise of eminent domain; contracts purporting to require the exercise of the eminent domain power are therefore acceptable under the reserved powers doctrine, Plaintiffs contend. These arguments are illusory. The sovereign right of eminent domain necessarily consists of the discretion to exercise that power in the manner the sovereign deems to be in the public's best interest. A contract requiring the sovereign to exercise the power is just as limiting as a contract prohibiting it from doing so. Although factually distinguishable, the Supreme Court's recent decision in *Kelo* may be construed as support for the proposition that a legislature's power of eminent domain necessarily encompasses the ability to both exercise the right and to limit the right. *Kelo*, 125 S.Ct. at 2668 ('In affirming the City's authority to take petitioners' properties, ... [w]e emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.').

App. D at 49a, 378 F. Supp. 2d at 1257.

The Ninth Circuit disagreed with the district court and held:

> *West River Bridge* and *Contributors to Pennsylvania Hospital* stand for the proposition that the Contracts Clause cannot be used to bind a state to a contract that prevents it from exercising its power of eminent domain. Yet such facts have not been alleged here. In this case, the Lessees have not accused the City of impairing its contracts with them by exercising its power of eminent domain to take for public use property which it previously conveyed to the Lessees. Instead, the Lessees accuse the City of reneging on its contractual promise to use its best efforts to effectuate a condemnation proceeding against the property at Discovery Bay and, if successful, to convey the property to the Lessees. Accordingly, we find the Lessees' claim to be distinct from those Contracts Clause claims to which the Supreme Court has applied the reserved powers doctrine in the past.

App. A at 12a, 512 F.3d at 1154.

The Ninth Circuit's artificial distinction between contracts that require the City **not to** exercise its power of eminent domain, and contracts that require the City **to** exercise its power of eminent domain serves as the basis for this petition. The City asserts that any contractual constraint on the City Council's determination of public purpose in the exercise of its power of eminent domain cannot be binding on the City under the reserved powers doctrine. In the repeal of Chapter 38 by Ordinance 05-001, the City Council

specifically determined that leasehold conversion was no longer supported by a valid public purpose. The City Council chose to cease the use of its power of eminent domain for leasehold conversion. Therefore, under the reserved powers doctrine, the City Council cannot be constrained in this choice by a contract that binds the City to affirmatively exercise its power of eminent domain.

D. COURTS MUST DEFER TO THE LEGISLATIVE BRANCH'S DETERMINATION OF PUBLIC USE

The courts must defer to the legislative branch when faced with issues of public purpose and eminent domain. This Court has long held that the necessity and proper extent of a taking is a legislative question. *Sears v. City of Akron*, 246 U.S. 242, 251 (1918). This Court recognized that the "legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation." *Berman v. Parker*, 348 U.S. 26, 32 (1954), and the public interest requirement is "coterminous with the scope of a sovereign's police powers." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). In *Berman,* this Court clearly stated that "when the legislature has spoken, the public interest has been declared in term well-nigh conclusive." 348 U.S. at 32. In *Midkiff,* this Court reiterated the holding of *Berman*, in holding that the court's role in reviewing a determination of a public use "is an extremely narrow one." 467 U.S. at 240 (quoting *Berman*, 348 U.S. at 32). Most recently, this Court stated that "for more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures

broad latitude in determining what public needs justify the use of the taking power." *Kelo v. City of New London*, 545 U.S. 469, 482, 125 S. Ct. 2655, 2664 (2005). In all of these cases, this Court emphasized the importance of deferring to legislative determinations of public purpose.

Midkiff stood for the proposition that the State of Hawaii's purpose of eliminating the "social and economic evils of a land oligopoly" qualified as a valid public use, justifying the enactment of a leasehold conversion statute for single-family dwellings in Hawaii. 467 U.S., at 241-242, 104 S.Ct. 2321. Likewise, the Ninth Circuit upheld the constitutionality of Chapter 38, the leasehold conversion ordinance for condominium units, in *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1995). Both this Court in *Midkiff* and the Ninth Circuit in *Richardson*, afforded the state and local legislatures great deference in their determination of the public purpose supporting mandatory leasehold conversions. That same deference should be afforded to the Honolulu City Council in its repeal of the leasehold conversion ordinance (Chapter 38), and in its legislative determination that condominium leasehold conversions no longer serve a public purpose.

When the City Council enacted Chapter 38, a public purpose supported the use of its eminent domain power. The City Council found that runaway land prices, forced long-term leases, and land values artificially inflated by concentrated ownership shouldered the public purpose requirement. App. E at 53a-58a. However, some fourteen years later, the

Council found that the same socio-economic conditions no longer existed to justify the use of the City's eminent domain power to reallocate land ownership on Oahu. App. G at 131a-132a. Without this public purpose, the City Council was left with no choice but to repeal Chapter 38 through the enactment of Ordinance 05-001.

This Court must not question the City Council's finding of an absence of public purpose. As the district court stated, "The sovereign right of eminent domain necessarily consists of the discretion to exercise that power in the manner the sovereign deems to be in the public's best interest." App. D at 49a, 378 F. Supp. 2d at 1257. Here, the City Council chose not to exercise that power when the reallocation of land ownership through prior condemnations under Chapter 38 balanced the land oligopoly. This Court must not interfere with the City Council's determinations regarding the absence of a public purpose.

E. THE CITY'S EMINENT DOMAIN POWER IS NOT BOUND BY THE PROHIBITION IN THE CONTRACT CLAUSE.

This Court has ruled that the prohibition in the contract clause is eclipsed by the government's eminent domain power. As early as 1917, this Court has held:

> There can be now, in view of the many decisions of this court on the subject, no room for challenging the general proposition that the states cannot by virtue of the contract clause be held to have divested themselves by contract of

> the right to exert their governmental authority in matters which from their very nature so concern that authority that to restrain its exercise by contract would be a renunciation of power to legislate for the preservation of society or to secure the performance of essential governmental duties....[I]t is equally true that *the previous decisions of this court leave no doubt that the right of government to exercise its power of eminent domain upon just compensation for a public purpose comes within this general doctrine.*

Contributors to Pennsylvania Hosp. v. City of Philadelphia, 245 U.S. 20, 23-24 (1917). (Emphasis added).

In a later decision, this Court carved out the path for lower courts to follow. This Court stated:

> When a State impairs the obligation of its own contract, the reserved-powers doctrine has a different basis. The initial inquiry concerns the ability of the State to enter into an agreement that limits its power to act in the future. As early as Fletcher v. Peck, the Court considered the argument that one legislature cannot abridge the powers of a succeeding legislature. It is often stated that the legislature cannot bargain away the police power of a State. This doctrine requires a determination of the State's power to create irrevocable contract rights in the first place, rather than an inquiry into the purpose or reasonableness of the subsequent impairment.

> *In short, the Contract Clause does not require a state to adhere to a contract that surrenders an essential attribute of its sovereignty. . . [T]he police power and the power of eminent domain were among those that could not be contracted away.*

United States Trust Company of New York v. New Jersey, 431 U.S. 1, 23 (1977). (Internal citations and quotations omitted) (Emphasis added).

The Ninth Circuit held that the district court erred in failing to apply a "heightened scrutiny test" in reviewing the Contract Clause claim. However, under the reserved powers doctrine, the court's initial inquiry is whether the government has the ability to enter into an agreement that limits its power to act in the future. As the district court herein explained, "[t]his inquiry requires a determination as to the state's power to create irrevocable contract rights, rather than an inquiry into the purpose or reasonableness of the subsequent impairment. 'In short, the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty.'" App. D at 46a, 378 F. Supp. 2d at 1255. (Citations omitted). A Contract Clause analysis which assesses the purpose or reasonableness of any impairment of Lessees' contracts is simply inapplicable.

Here, Lessees should not prevail on their claim under the Contract Clause. The Lessees' contracts with the City limit the City's power by forcing it to exercise its condemnation powers when the public

purpose that once supported the contracts no longer exists.

This Court has considered this issue and ruled. As the district court explained, "the United States Supreme Court has repeatedly held for more than a century that the Contracts Clause cannot be used to bind the state to a contract that purports to restrict its power of eminent domain. App. D at 46a, 378 F. Supp. 2d at 1255. The prohibition in the Contracts Clause bows to the power of eminent domain, which is an "essential attribute of sovereignty." *Id.*

F. LESSEES' SUBSTANTIVE DUE PROCESS CLAIM FAILS BECAUSE IT IS PREEMPTED BY OTHER CONSTITUTIONAL CLAIMS.

The Lessees claim that the City violated their substantive due process rights as contained in the Fourteenth Amendment that states, "[n]o State shall . . . deprive any person of . . . property, without due process of law." However, Lessees are precluded from asserting a contract clause claim and a substantive due process claim in the same breath.

The Ninth Circuit in its opinion below stated:

> We express no opinion as to whether any property interests potentially arising from the Lessees' contracts could meet the 'exceedingly high' burden our Due Process jurisprudence imposes. Furthermore, we express no opinion as to whether our decision in *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc),

> precludes the Lessees from asserting a substantive due process claim in this case, where the Contracts Clause provides a specific source of constitutional protection against the government conduct of which they complain.

App. A at 17a-18a, 512 F.3d at 1156.

Even if the Ninth Circuit now expresses no opinion on the effect of the *Armendariz* case, the Ninth Circuit previously ruled in no uncertain terms, "when an explicit textual provision of the Constitution protects against the challenged government action, the claim must be analyzed under that specific provision alone and not under the more general guarantee of substantive due process." *Macri v. King County*, 126 F.3d 1125, 1128 (9th Cir. 1997) (citing *Armendariz*, 75 F.3d 1311, 1325-1326 (1996)). This is true regardless of whether the plaintiff's potential claim under the more specific textual provision has merit. *Armendariz* at 1325-1326.

Consequently, Lessees' substantive due process claim fails because it is preempted by the more specific constitutional provision, the contract clause, regardless of its merits.

Furthermore, as discussed above, Lessees cannot establish a property right under the subject contract because the City's eminent domain power cannot be surrendered under any terms.

G. LESSEES ARE NOT ENTITLED TO RELIEF UNDER 42 U.S.C. § 1983.

As demonstrated above, the City did not violate Lessees' constitutional rights. The protection afforded by the reserved powers doctrine shields the City from culpability.

Furthermore, as previously stated, the City Council found that the social and economic ills do not exist today in the same manner that they did in 1991. Based upon this finding, the City Council repealed Chapter 38. The Council did not have a culpable intent to deprive Lessees of their constitutional rights. *See Board of the County Commissioners of Bryan County*, 520 U.S. 378, 404 (1989) (A 1983 plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights).

Therefore, Lessees' claims under 42 U.S.C. § 1983 also fail.

CONCLUSION

In light of the above facts and authorities, the City respectfully requests that the City's Petition for Writ of Certiorari be granted.

DATED: Honolulu, Hawaii, April 14, 2008.

Respectfully submitted,

CARRIE K. S. OKINAGA
Corporation Counsel

DONNA M. WOO
Counsel of Record
First Deputy Corporation Counsel
City and County of Honolulu
530 S. King Street, Room 110
Honolulu, Hawaii 96813

DON S. KITAOKA
Deputy Corporation Counsel
City and County of Honolulu
530 S. King Street, Room 110
Honolulu, Hawaii 96813

Attorneys for Petitioner
City and County of Honolulu